

Imperial Hospital; Donald W. Henry, Trustee in Bankruptcy and Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO. Case 31-CA-9901

August 5, 1981

DECISION AND ORDER

Upon a charge filed on March 24, 1980, by Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO (hereinafter the Union), and duly served on Imperial Hospital (hereinafter Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a consolidated complaint¹ on July 29, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer.

On January 9, 1981, an amendment to the charge was filed by the Union. On February 6, 1981, an amended complaint was issued, naming Donald W. Henry, Respondent's trustee in bankruptcy (hereinafter Respondent's Trustee), as a successor in bankruptcy to Respondent.² Copies of the amended charge and amended complaint were duly served on Respondent and Respondent's Trustee. Respondent failed to file an answer to the amended complaint.

With respect to the unfair labor practices, the amended complaint alleges in substance the following: Respondent was at all times material herein prior to December 15, 1979, a health care institution. Since on or about July 14, 1980, Respondent's Trustee has been duly designated pursuant to an order of the United States Bankruptcy Court for the Central District of California as the trustee in bankruptcy of Respondent. As such, Respondent's Trustee was at all times material herein, and is, a

successor in bankruptcy to Respondent. At all times material herein, the Union has been, and continues to be, the exclusive collective-bargaining representative of certain of Respondent's employees within an appropriate unit,³ and the Union has been recognized as such representative by Respondent. Such recognition has been embodied in a collective-bargaining agreement, which is effective by its terms from October 1, 1977, through September 30, 1980.

The amended complaint further alleges that commencing on or about October 1, 1979, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain with the Union as the exclusive collective-bargaining representative of all the employees in the above-described unit in that since on or about October 1, 1979, and continuing to date, Respondent (1) has failed and refused to pay to the Union dues and initiation fees withheld from employees in the unit described above during the period from October 1, 1979, through December 15, 1979; (2) has failed and refused to pay to the Building Service Employees Health and Welfare Trust Fund (hereinafter Trust Fund) amounts due and owing for dental plan coverage as required by the collective-bargaining agreement for the period from October 1, 1979, to December 15, 1979.

On March 27, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment based on the failure of Respondent to file an answer as required by Sections 102.20 and 102.21 of the National Labor Relations Board Rules and Regulations, Series 8, as amended. Subsequently, on April 3, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent and Respondent's Trustee have filed no responses to the Notice To Show Cause and, accordingly, the allegations of the

³ The amended complaint alleges that the following employees of Respondent constitute an appropriate unit:

Included: All full-time and regular part-time darkroom attendants, orderlies, food service workers, messengers, housekeeping aides, receiving clerks, file clerks, central supply technicians, nurses' assistants, maintenance helpers, cashiers, mail/refund cashiers, PBX operators, respiratory therapy trainees, account clerks, admitting clerks, utility review clerks, control clerks, insurance billers, key-punch operators, pharmacy clerks, ward clerks, ER clerks, dietitian's assistants, cooks, discharge clerks, financial counsellors (collectors), senior insurance billers, storekeepers, operating room technicians, bookkeepers, maintenance men, respiratory therapy technicians I, LVNs I, certified or techs., respiratory therapy technicians II, LVNs II, medical transcribers, and respiratory therapy technicians III.

Excluded: All other employees, including guards and supervisors as defined in the Act.

¹ The complaint consolidated Cases 31-CA-9901 and 31-CA-10086. Subsequently, on February 6, 1981, the Regional Director severed Case 31-CA-9901 from Case 31-CA-10086; additionally, the Regional Director withdrew the complaint in Case 31-CA-10086 and dismissed the charge therein. Thus, the amended complaint discussed herein involves only Case 31-CA-9901.

² The amended complaint alleges that Respondent's Trustee is a successor in bankruptcy to Respondent. Under Board law, a trustee in bankruptcy is the *alter ego* of a bankrupt employer and a successor in law *vis-a-vis* the Union. *Marion Simcox, Trustee of Wagner Shipyard and Marina, Inc., and Stateside Service, Inc., d/b/a Stateside Shipyard and Marina, Inc.*, 178 NLRB 516, 518 (1969). Thus, Respondent's Trustee is bound by law to honor any bargaining obligation owed by Respondent to the Union, and privileged to assert any claims or defenses which Respondent might have asserted.

Motion for Summary Judgment stand uncontroverted.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without such knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The consolidated complaint and notice of hearing issued on July 29, 1980, and duly served on Respondent, and the amended complaint and notice of hearing issued on February 6, 1981, and served on Respondent and Respondent's Trustee, specifically state that unless an answer to the complaint is filed by Respondent within 10 days from the service thereof "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." According to the record herein, and the uncontroverted allegations of the Motion for Summary Judgment, Respondent failed to file any answers to the complaint or to the amended complaint, within 10 days from their service.⁴ On March 30, 1981, counsel for the General Counsel filed the Motion for Summary Judgment herein, and on April 3, 1981, the Board issued a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent and Respondent's Trustee did not file a response to the Notice To Show Cause. No good cause to the contrary having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted and found to be true. Accordingly, we grant the Motion for Summary Judgment.

⁴ The record further indicates that counsel for the General Counsel sent letters to Respondent and Respondent's Trustee on February 18, 1981, stating that a Motion for Summary Judgment would be filed due to Respondent's failure to file an answer to the amended complaint. The letter to Respondent's Trustee also states that Respondent's Trustee is not being charged with the commission of any unfair labor practices, but only as the trustee in bankruptcy.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation with its principal place of business in Inglewood, California, was at all times material herein engaged in the operation of a proprietary hospital until on or about December 15, 1979. Respondent, in the course and conduct of its business operations, annually purchased and received goods or services valued in excess of \$50,000 from sellers or suppliers located within the State of California, which sellers received such goods in substantially the same form directly from outside the State of California. In the course and conduct of its business operations, Respondent annually derived gross revenues in excess of \$250,000. Since on or about July 14, 1980, Respondent's Trustee has been duly designated pursuant to an order of the U.S. Bankruptcy Court for the Central District of California as the trustee in bankruptcy of Respondent. By virtue of the above, Respondent's Trustee is, and has been at all times material herein, a successor in bankruptcy to Respondent.

We find, on the basis of the foregoing, that Respondent, and its successor in bankruptcy, Respondent's Trustee, are and have been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and have operated a health care institution within the meaning of Section 2(14) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Unit*

The following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time darkroom attendants, orderlies, food service workers, messengers, housekeeping aides, receiving clerks, file clerks, central supply technicians, nurses' assistants, maintenance helpers, cashiers, mail/refund cashiers, PBX operators, respiratory therapy trainees, account clerks, admitting clerks, utility review

clerks, control clerks, insurance billers, key-punch operators, pharmacy clerks, ward clerks, ER clerks, dietician's assistants, cooks, discharge clerks, financial counsellors (collectors), senior insurance billers, store-keepers, operating room technicians, book-keepers, maintenance men, respiratory therapy technicians I, LVNs I, certified or techs., respiratory therapy technicians II, LVNs II, medical transcribers, and respiratory therapy technicians III.

Excluded: All other employees, including guards and supervisors as defined in the Act.

B. The Bargaining History

At all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the above-described unit, and the Union has been recognized as such representative by Respondent. Such recognition has been embodied in a collective-bargaining agreement, which is effective by its terms from October 1, 1977, through September 30, 1980. At all times material herein, the Union, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

C. The 8(a)(5) and (1) Charge

Commencing on or about October 1, 1979, and continuing to date, the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive collective-bargaining representative of all the employees of Respondent in the above-described unit. Commencing on or about October 1, 1979, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative in that since on or about October 1, 1979, and continuing to date, Respondent (1) has failed and refused to pay to the Union dues and initiation fees withheld from employees in the unit described above during the period from October 1, 1979, through December 15, 1979;⁵ and (2) has failed and refused to pay

⁵ The collective-bargaining agreement provides in pertinent part:

ARTICLE III - CHECKOFF

Section 1. Deduction of Initiation Fee and Dues Upon receipt of an individual, voluntary, written and irrevocable checkoff authorization from an employee included in the bargaining unit, the Employer will

to the Trust Fund amounts due and owing the Trust Fund for dental plan coverage of employees in the unit described above for the period October 1, 1979, to December 15, 1979.⁶ Respondent engaged in the acts and conduct described above without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as exclusive representative of Respondent's employees with respect to such acts and conduct.

Accordingly, we find that by the aforementioned conduct Respondent did refuse to bargain collectively, and is refusing to bargain collectively, with the Union as the exclusive collective-bargaining representative of the employees in the unit, and that Respondent did thereby engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order Respondent and its Trustee in Bankruptcy to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. We have found that Respondent violated the Act by failing and refusing to pay to the Union dues and initiation fees withheld from employees in the unit during the period from October 1, 1979, through December 15, 1979. We shall

deduct from the pay of such employee on receipt of billing each calendar month a sum equal to that employee's Union initiation fee and dues which fell due during the immediately preceding month and only so long as such employee was employed by Employer at the time such obligations became due. In no event shall any charge be made to an employee which accrued prior to the date of hire or the date of execution of this Agreement, whichever is later.

⁶ The collective-bargaining agreement provides in relevant part:

ARTICLE XI - HOSPITAL, MEDICAL AND LIFE INSURANCE

Section 2.

Effective October 1, 1979, the employer shall pay the amount of \$26.05 per month for the BSEIU Dental Plan coverage which covers each employee and their dependents. Employer agrees that there shall be a maintenance of benefits to the above referred plan.

therefore order Respondent and its Trustee in Bankruptcy to cease and desist from engaging in such conduct and further order that they pay over to the Union a sum of money, plus interest thereon, equal to the sum of all dues checked off and not remitted to the Union.⁷ Additionally, we have found that Respondent failed and refused to pay to the Trust Fund amounts due and owing the Trust Fund for dental plan coverage of employees in the unit for the period from October 1, 1979, to December 15, 1979. We shall therefore order that Respondent and its Trustee in Bankruptcy make whole the employees in the unit by paying all contributions to the Trust Fund, as provided in the 1977-80 collective-bargaining agreement, for the period from October 1, 1979, through December 15, 1979, which have not been paid.⁸ Respondent and its Trustee in Bankruptcy will be required to preserve and, upon request, make available to authorized agents of the Board all records necessary or useful in determining compliance with the Order.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Imperial Hospital and its Trustee in Bankruptcy, Donald W. Henry, are an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act:

Included: All full-time and regular part-time darkroom attendants, orderlies, food service workers, messengers, housekeeping aides, receiving clerks, file clerks, central supply technicians, nurses' assistants, maintenance helpers, cashiers, mail/refund cashiers, PBX

operators, respiratory therapy trainees, account clerks, admitting clerks, utility review clerks, control clerks, insurance billers, key-punch operators, pharmacy clerks, ward clerks, ER clerks, dietician's assistants, cooks, discharge clerks, financial counsellors (collectors), senior insurance billers, storekeepers, operating room technicians, bookkeepers, maintenance men, respiratory therapy technicians I, LVNs I, certified or techs., respiratory therapy technicians II, LVNs II, medical transcribers, and respiratory therapy technicians III.

Excluded: All other employees, including guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the above-described unit.

5. Commencing on or about October 1, 1979, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative in that since on or about October 1, 1979, and continuing to date, Respondent (1) has failed and refused to pay to the Union dues and initiation fees withheld from employees in the above-described unit during the period from October 1, 1979, through December 15, 1979; and (2) has failed and refused to pay to the Trust Fund amounts due and owing the Trust Fund for dental plan coverage of employees in the unit described above for the period October 1, 1979, to December 15, 1979. By the above-described conduct, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid conduct, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Imperial Hospital, Inglewood, California, and its Trustee in Bankruptcy, Donald W. Henry, their officers, agents, successors, and assigns, shall:

⁷ See *Independent Stave Company*, 248 NLRB 219, 221 (1980). Interest upon the sum shall be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁸ Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent and Respondent Trustee must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213 (1979).

1. Cease and desist from:

(a) Failing and refusing to pay to Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, herein the Union, dues and initiation fees withheld from employees in the unit during the period from October 1, 1979, through December 15, 1979, as required by its collective-bargaining agreement with the Union, effective by its terms through September 30, 1980.

(b) Failing and refusing to pay to the Trust Fund amounts due and owing the Trust Fund for dental plan coverage of employees in the unit for the period from October 1, 1979, to December 15, 1979, as required by its aforesaid collective-bargaining agreement with the Union.

(c) Refusing to bargain collectively with the Union concerning rates of pay, wages, hours, and other terms and conditions of employment. The bargaining unit is:

Included: All full-time and regular part-time darkroom attendants, orderlies, food service workers, messengers, housekeeping aides, receiving clerks, file clerks, central supply technicians, nurses' assistants, maintenance helpers, cashiers, mail/refund cashiers, PBX operators, respiratory therapy trainees, account clerks, admitting clerks, utility review clerks, control clerks, insurance billers, key-punch operators, pharmacy clerks, ward clerks, ER clerks, dietician's assistants, cooks, discharge clerks, financial counsellors (collectors), senior insurance billers, storekeepers, operating room technicians, bookkeepers, maintenance men, respiratory therapy technicians I, LVNs I, certified or techs., respiratory therapy technicians II, LVNs II, medical transcribers, and respiratory therapy technicians III.

Excluded: All other employees, including guards and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Remit to the Union any and all union dues and initiation fees withheld from employees and not yet remitted to the Union during the period from October 1, 1979, through December 15, 1979, in the manner set forth in the remedy section of this Decision.

(b) Make all payments owed to the Trust Fund for dental plan coverage of employees in the unit

for the period from October 1, 1979, to December 15, 1979.

(c) Preserve and, upon request, make available to authorized agents of the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the moneys due under the terms of this Order.

(d) Post at the facility in Inglewood, California, copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's and Respondent's Trustee's representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent and Respondent's Trustee to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent and Respondent's Trustee have taken to comply herewith.

⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT fail and refuse to pay to the Union dues and initiation fees withheld from employees in the unit during the period from October 1, 1979, through December 15, 1979, as required by our collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to pay to the Trust Fund amounts due and owing the Trust Fund for dental plan coverage of employees in the unit for the period from October 1, 1979, to December 15, 1979, as required by our collective-bargaining agreement with the Union.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below. The bargaining unit is:

Included: All full-time and regular part-time darkroom attendants, orderlies, food service workers, messengers, housekeeping aides, receiving clerks, file clerks, central supply technicians, nurses' assistants, maintenance helpers, cashiers, mail/refund cashiers, PBX operators, respiratory therapy trainees, account clerks, admitting clerks, utility review clerks, control clerks, insurance billers, key-punch operators, pharmacy clerks, ward clerks, ER clerks, dietician's assistants, cooks, discharge clerks, financial counsellors (collectors), senior insurance billers, storekeepers, operating room technicians, bookkeepers, maintenance men, respiratory ther-

apy technicians I, LVNs I, certified or techs., respiratory therapy technicians II, LVNs II, medical transcribers, and respiratory therapy technicians III.

Excluded: All other employees, including guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL pay over to the Union any and all dues and initiation fees withheld from employees during the period from October 1, 1979, through December 15, 1979, which have not yet been remitted to the Union, plus interest thereon.

WE WILL make all payments owed to the Trust Fund for dental plan coverage of employees in the unit for the period from October 1, 1979, to December 15, 1979.

WE WILL, upon request, recognize and bargain collectively with the Union as the representative of the employees in the above unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment.

IMPERIAL HOSPITAL; DONALD W.
HENRY, TRUSTEE IN BANKRUPTCY